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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1196

WILLIAM A. PORTER, ET AL, *Petitioner*

v.

W. FRANCIS WILSON, ET AL, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, WILLIAM A. PORTER, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on November 19, 1969.

OPINIONS BELOW

The Order for Dismissal and Judgment of the United States District Court for the District of Arizona, is unreported and appended to this petition as Appendix A.

The order of the United States District Court overruling Plaintiffs' Motion for New Trial is unreported and appended to this petition as Appendix B.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at ..... F2d....., and a copy thereof is appended to this petition as Appendix C.

JURISDICTION

The judgment of the Ninth Circuit Court was entered on November 19, 1969. The jurisdiction of this Court is invoked under Article IV, Section 1 of the United States Constitution and 28 U.S.C., Sect. 1738.

QUESTIONS PRESENTED

The Arizona Federal District Court was faced with a conflict between two state court decisions. An Idaho court determined that Petitioner and his two sisters were the rightful owners of certain Arizona realty. But an Arizona court reached the opposite decision, and awarded the property to the Respondents' vendor. Petitioner and his two sisters instituted this diversity action in the Arizona Federal District Court to enforce their Idaho judgment and to quiet title to the Arizona property. Both parties moved for summary judgment on the grounds that the prior state court actions were res judicata. The Federal Court granted the Respondents' Motion to Dismiss with prejudice because it felt "obligated under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) to follow the conflict of law rules promulgated by the Supreme Court of . . . (Arizona)." (Tr. 91, See Appendix B) The questions presented are as follows:

1. Whether a Federal Court must give preference to the decision of the forum state regardless of the forum state's disregard of full faith and credit principles.

2. Whether the prior determination by the Idaho court was entitled to full faith and credit and was res

judicata to all issues before the Federal District Court located in Arizona.

STATUTES INVOLVED

Article IV, Section 1 of the United States Constitution provides as follows:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The pertinent portion of 28 U.S.C., Section 1738 (1948) provides as follows:

> "Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state, territory or possession from which they are taken."

STATEMENT

In 1961 the Petitioner, WILLIAM A. PORTER, and his two sisters, Pauline P. Leonard and Pearline Porter, doing business as the Continental Hotels System, a co-partnership, instituted this diversity action against Respondents, W. FRANCIS WILSON and PAULINE WILSON, his wife, and RICHARD A. WILSON and SHARON L. WILSON, his wife, to quiet title to real property known as the Arizona Hotel in Phoenix, Maricopa County, Arizona. (Tr. 1)

The Plaintiffs asserted fee title through a deed from Mrs. Gladys Porter, the former wife of William A. Porter. The Respondents claimed their interest in the Arizona Hotel through a deed from Gladys A. Porter, dated May 4, 1960. The Plaintiffs and Defendants moved for Summary Judgment in the Federal Court on the grounds that prior actions were res judicata. The trial court dismissed the Plaintiffs' case on Defendants' Motion (Tr. 87, 88), and William A. Porter was the only party to appeal before the Ninth Circuit.

BACKGROUND AND PRIOR ACTIONS

William A. Porter and his wife Gladys were married in Detroit, Michigan in 1940, and shortly afterwards moved to Kootenai County, Idaho. Idaho remained their marital domicile. In 1943, Gladys and Arnold, as he is known, and Pearline and Pauline, his sisters, formed a partnership for ownership and operation of a group of hotels owned by the parties. In August of 1943, a deed was executed conveying title to the Arizona Hotel to Gladys and Arnold (no mention was made of any interest of the Porter sisters). The Arizona Hotel property is located in downtown Phoenix and is the subject matter of this litigation.

In December of 1958, Gladys left her home in Idaho, came to Phoenix, and on February 13, 1959, instituted a Complaint for Separate Maintenance against her husband in the Superior Court of Maricopa County, Arizona. Service was obtained upon Mr. Porter by publication and registered mail. The Complaint alleged that Mrs. Porter was a resident of Arizona, and that the Arizona Hotel was community property.

Mr. Porter did not appear, but his two sisters intervened in the Maricopa County action alleging that although the title to the Arizona Hotel was recorded in the name of Arnold and Gladys Porter, the hotel actually belonged to the Continental Hotel System, the Porter family co-partnership. During the pendency of the separate maintenance action, the Arizona Court appointed a Receiver to run the hotel. On May 14, 1959, the Arizona Court entered a decree of separate maintenance in favor of Mrs. Porter. This Judgment imposed a lien on the hotel in excess of $25,000 for support payments of $3,000 monthly (which were later reduced to $1,000 per month), as well as attorneys' fees and costs. Arnold never appeared in the separate maintenance action and was never personally served.

On May 25, 1959, Arnold filed a Complaint for divorce against Gladys in the Eighth Judicial District Court of Kootenai County, Idaho (Tr. 16-26). The Porter sisters intervened in this action, claiming they owned a one-third interest as partners in the Arizona Hotel. Gladys personally appeared, answered and filed a cross-action for a divorce (Tr. 27-51). On July 21, 1959, after Gladys had filed her answer in the Idaho Court, the Maricopa County Superior Court in Arizona entered a Judgment for the arrearage in support payments which Gladys claimed from Arnold. A Writ of Execution was issued in Maricopa County and in August, 1959, Gladys purchased the hotel from the Sheriff. On April 7, 1960, Gladys received a sheriff's deed to the property.

On May 4, 1960, during the trial of the Idaho case

before the Court, Gladys gave a deed to her attorneys, the Wilsons, conveying to them an undivided one-half interest in the Arizona Hotel. On December 28, 1960, the Idaho District Court, after trial, entered its findings of fact and conclusions of law (Tr. 53-64, 66-74). The Idaho Court granted Gladys a divorce on her counterclaim, determined that the Arizona Hotel was partnership property rather than the sole property of Arnold and Gladys Porter, and awarded the couple's two-thirds partnership interest in the hotel to Arnold. Gladys was ordered to dismiss the proceedings in Arizona and in the future refrain from maintaining any action against Arnold and the Porter sisters concerning the hotel. Relying on the fact that its Judgment was the first final adjudication of the title to the Arizona Hotel and that its' Order would effectively vest title to the hotel in Arnold and his two sisters, the Idaho divorce court divided the family's community property so that Gladys got everything except the Arizona property. Other than the two-thirds interest in the hotel, Arnold received one automobile, his personal clothing, and his sporting equipment in the property division. Gladys appealed that portion of the decree affecting the hotel, but the Idaho Supreme Court upheld the Idaho divorce decree in *Porter v. Porter*, 84 Idaho 400, 373 Pac. 2d, 327 (1962).

Armed with a final adjudication vesting one-third ownership of the Arizona Hotel in them, the Porter sisters returned to Arizona and filed a Supplemental Complaint in Intervention in the separate maintenance proceeding. The sisters prayed that full faith and credit be given to the prior Idaho Judgment. The

Arizona separate maintenance action was tried before a jury on December 18, 1961. At the trial, the Porter sisters attempted to introduce documentary evidence to prove that the hotel belonged to the partnership, but it was rejected upon Gladys' objection (Tr. 53-64, 66-74). The deeds which the Idaho Court ordered Gladys to execute to Arnold and his two sisters were received into evidence. The Porter sisters also introduced a release of the Arizona decree of separate maintenance entered by the Maricopa County Superior Court on May 14, 1959. In the face of this the Arizona Court entered a directed verdict that the sisters take nothing and that Gladys recover her costs. The trial court was reversed by the Arizona Court of Appeals Division One *(Porter v. Porter*, 1 Ariz. App., 363, 403 P.2d 298 (1965), which was itself reversed by the Arizona Supreme Court in a split decision. *Porter v. Porter*, 101 Ariz. 131, 416 P. 2d 564 (1966), cert denied. 386 U.S. 957 (1967).

In April of 1961, Petitioner and his two sisters filed this suit to quiet title to the Arizona Hotel. The actual trial of the case was delayed because of a wish to avoid concurrent federal and state court litigation. After the decision of the Supreme Court of Arizona was rendered in *Porter v. Porter*, *id*, the Defendants-Respondents moved for Summary Judgment alleging that the Arizona State Court opinion was res judicata (Tr. 78). Petitioner and his sisters asserted then that the prior Judgment of the Idaho Supreme Court was res judicata (Tr. 77) under the doctrine of *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939). The Defendants' Motion for Summary Judgment or to dis-

miss for failure to state a claim was set for hearing before the Federal Court in Phoenix on June 12, 1967. Petitioners' counsel, Sterling W. Steves, moved for a continuance on the grounds that he was already under orders to report for active duty with the VIII United States Army Corps on June 10, 1967, for two weeks of active duty (Tr. 83, Affidavit Tr. 84-86).

The Motion for Continuance was denied and the Defendants-Respondents' Motion for Summary Judgment came on to be heard. The Court dismissed the Complaint for the reason that there was no issue to try (Tr. 87, see Appendix A). Petitioner moved for a new trial on the grounds inter alia, of failing to grant the Motion for Continuance (Tr. 89), and failure to give full faith and credit to the Idaho decree. The trial court denied the Motion on the ground that the Court was required to follow the conflict of law rules promulgated by the Supreme Court of Arizona (Tr. 91, see Appendix B).

The Arizona Hotel has now been sold by the Wilsons and Gladys to the City of Phoenix (Tr. 99).

After the trial court refused to grant the Plaintiffs' Motion for New Trial, Petitioner Arnold W. Porter without the joinder of his sisters appealed to the United States Court of Appeals for the Ninth Circuit alleging as error that:

1. The trial court erred in failing to grant Petitioners' Motion for a Continuance;

2. The trial court erred in failing to resolve a conflict between court decisions in different states by applying the Constitutional principles of "Full Faith and Credit"; and

3. The trial court erred in holding that the Idaho judgment is not entitled to Full Faith and Credit and is res judicata as to each and every ground, jurisdictional and otherwise.

The Ninth Circuit affirmed the trial court decision on November 19, 1969.

SPECIFICATIONS OF ERROR TO BE URGED

The Ninth Circuit Court of Appeals erred:

1. In failing to resolve a conflict between court decisions in different states by applying the Constitutional principles of "Full Faith and Credit."
2. In holding that the Idaho judgment is not entitled to Full Faith and Credit and is res judicata as to each and every ground.

REASONS FOR GRANTING WRIT

1. The Ninth Circuit erred in failing to resolve a conflict between court decisions in different states by applying the Constitutional Principles of "Full Faith and Credit".

The Arizona Federal District Court and the Ninth Circuit Court were faced with two conflicting state decisions:

a. that of the Arizona Superior Court entered on May 14, 1959, and later affirmed by the Arizona Supreme Court in *Porter v. Porter*, *supra*, 101 Ariz. 131, 416 P. 2d, 564 (1966); and

b. that of the Idaho trial court entered on December 28, 1960, and affirmed by the Supreme Court

of Idaho in *Porter v. Porter*, 84 Idaho 400, 373 P.2d 327 (1962). The resolution of such a conflict by a Federal Court must evolve from a consideration of the constitutional principles underlying the federal system and not from a mere preference for a forum state judgment. Regrettably, the Arizona Federal District Court side-stepped the full faith and credit issues in this case in preference to the decision of the Arizona Supreme Court. The United States Court of Appeals for the Ninth Circuit compounded the error and affirmed the trial court's decision.

The Constitution of the United States requires each state to give full faith and credit to the judicial proceedings of every other state. Article IV, Section 1 of the United States Constitution provides as follows:

> "Full Faith and Credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which acts, records and proceedings shall be proved, and the effect thereof."

Congress specifically directed Federal Courts to enforce the judicial proceedings of another state in the forum Federal Court. The pertinent portions of 28 U.S.C., Sect. 1738, provide:

> ". . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the Courts of the state, territory, or possession from which they are taken . . ."

This statute directs that if the principles of full faith and credit require that the Idaho judgment be enforced in Arizona, then the Federal District Court must enforce that Judgment regardless of any decision by the Arizona Supreme Court.

The Federal District Court held in denying Appellants' Motion for rehearing that the doctrine of *Erie v. Tompkins*, 304 U.S. 64 (1938), as extended by *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); and *Griffin v. McCoach*, 313 U.S. 198 (1941) (Tr. 91), controlled to force the court to give res judicata effect to the Arizona Supreme Court's decision. Similarly, the Ninth Circuit Court felt that *Erie* compelled it to favor the Arizona Supreme Court (See Appendix C, page 48). Both *Klaxon* and *Griffin* held that Federal Courts in diversity cases are governed by the choice of law rules laid down by the state courts where they sit. Undoubtedly, the forum state's conflicts rules should control in the typical diversity suit. But this case involves more than a simple diversity action. A determination of whether the prior decision of the Supreme Court of Idaho should be afforded full faith and credit under the Federal Constitution plainly overrides Arizona's choice of law rules. The following quotation and comment in *Moore's Federal Practice*, Vol. 1A, page 3408, reveals the effect of super imposing full faith and credit principles on the *Erie-Klaxon* doctrine:

> "In United States v. Pink (1942), 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796, Chief Justice Stone, in a dissenting opinion in which Justice Roberts joined, made the following statement as to con-

> flict of laws and full faith and credit, which seemingly is not at variance with the majority opinion:
>
> 'In administering and distributing the property thus within their control, the New York courts are free to apply their own rules of law including their own conflicts of laws [citing the Tompkins case, Griffin v. McCoach, *supra*, and Kriger v. Wilson (1916) 242 U.S. 171, 176, 37 S. Ct. 34, 35, 61 L.Ed. 229], *except in so far as they are subject to the requirement of the full faith and credit clause — a clause applicable only to the judgments and public acts of states of the Union and not those of foreign states.*'" (Emphasis supplied)

Petitioner agrees with the Arizona Federal Court's statement that it was bound to follow the conflict of laws promulgated by the Supreme Court of Arizona. But, in following the conflict rules of Arizona, the Federal Court should not have overlooked the requirements of the Full Faith and Credit Clause of the Federal Constitution.

In *Estin v. Estin*, 334 U.S. 541, (1947), this Court said:

> "The situations where a judgment of one State has been denied full faith and credit in another State, because its enforcement would contravene the latter's policy, have been few and far between. See Williams v. North Carolina, 317 US 287, 294, 295, 87 L.Ed 279, 283, 284, 63 S.Ct 207, 143 ALR 1273; Magnolia Petroleum Co. v. Hunt, 320 US 430, 438, 439, 88 L.Ed 149, 154, 155, 64 S.Ct. 208, 150 ALR 413, 15 NCCANS 529, and cases cited; Sherrer v. Sherrer, 334 U.S. 343 92

> L.Ed (Adv 1055) 68 S.Ct 1087 1097, 1 ALR 2d 1358, supra. The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns. Williams v. North Carolina, 317 U.S. 287, 3017, 302, 87 L.Ed 279, 287, 288, 63 S.Ct 207, 147 ALR 1273; Sherrer v. Sherrer, 334 U.S. 343, 92 L.Ed (Adv 1055), 68 S.Ct 1087, 1097, 1 ALR 2d 1358, supra. It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."

In *Durlacher v. Durlacher*, 123 F.2d 70 (9th Cir. 1941), cert denied, 315 U.S. 805. (1941), the Ninth Circuit resolved a conflict between the New York and Nevada state courts. Mrs. Durlacher obtained a support order from a New York Court. Subsequently, her husband Simon obtained a divorce in Nevada. After the Nevada decree became final, the New York court gave Mrs. Durlacher three maintenance judgments, on which she sought execution in the Nevada Federal District Court. Simon Durlacher maintained that the Federal Court should apply the law of Nevada, the forum state. The Ninth Circuit rejected this view at page 72:

> "Simon contends, however, that such faith and credit should not be given it since the present suit was instituted in Nevada and the Nevada United States District Court was bound to apply the law of the State of Nevada. The Nevada law

is claimed to be that, upon the dissolution of the marital tie, the Court in which the prior maintenance proceedings was pending lost jurisdiction to render a judgment for maintenance sums. Cf. Herrick v. Herrick, 55 Nev. 59, 25 P.2d 378. That is to say, the Nevada Federal Court could refuse to recognize the New York judgment because repugnant to Nevada law.

The Supreme Court has repeatedly held that under the full faith and credit clause of the constitution (extended by the Statute to the Court below), a judgment of a sister state must be enforced, even though the cause of action upon which the judgment is based is repugnant to the law of the state requested to enforce it . . ." (Citations)

The 9th Circuit ratified the *Durlacher* opinion in *Bassett v. Bassett*, 141 F.2d 954 (9th Cir. 1944). Once again the wife received a separate maintenance order from the New York Courts. The husband received a divorce in Nevada which purported to release him from the New York maintenance order. The wife received New York judgments for maintenance payments accrued subsequent to the Nevada divorce. The Federal District Court in Nevada had to resolve the conflicting state decrees concerning the enforcibility of a New York maintenance decree after a Nevada divorce.

Once again the Nevada Federal District Court was directed by the 9th Circuit to resolve the conflict by full faith and credit, and not by local state loyalty. The 9th Circuit held that full faith and credit required that the New York decree be enforced.

> "In the case of *Durlacher v. Durlacher*, 9th Cir., 123 F2d 70, we reviewed the procedure of the New York Court in circumstances substantially identical to those herein and held that since the judgment entered in the New York Court was in all respects a valid judgment, it could not be set aside or affected by a judgment of a court of another state . . ." 141 F2d at 955.

The relevant consideration for this court, then, is whether the Idaho decree is entitled to full faith and credit in the Federal District Court in Arizona.

This case is on all fours with *Durlacher and Bassett*. The Federal District Court was confronted with a conflict between the State Court decisions of Idaho and Arizona. The Constitution requires that the Federal Court decide the conflict on the basis of full faith and credit principles. The *Durlacher* and *Bassett* courts did not feel compelled to follow the decision of the forum state, and there is nothing in the case at bar which obligates the Arizona Federal Court to follow an Arizona state court decision which flies in the face of the underlying principle of federalism.

The Ninth Circuit court classified this suit to quiet title in the Arizona Hotel as an attempt to review and revise the decision of the Supreme Court of Arizona (See Appendix C, at page 46). Petitioner Arnold W. Porter did not seek review of the Arizona Supreme Court. He merely sought to have the prior Idaho judgment accorded full faith and credit in the Arizona Federal District Court. The Continental Hotels System filed this diversity action five years before the Arizona Supreme Court's opinion. It would be difficult

to classify this action as an appeal. The circuit court also contends that Petitioners and the partnership "had ample opportunity to litigate the full faith and credit issue to the Arizona Court," and implies that Petitioners' act of joining his sisters in application to the Federal District Court for a stay of further proceedings while a decision was pending before the Arizona Supreme Court was the equivalent of an admission by the partnership of the res judicata effect of the state court's judgment (Appendix C, at 45), Petitioner did not intend to waive his valid Idaho judgment. His move to stay proceedings in the Federal Court was precipitated by a wish to avoid multiple litigation by the Phoenix law firm of Beer and Polley, which was at that time representing both Petitioner and his sisters.

The Ninth Circuit fairly stated the rule that "a quasi-in-rem judgment by a court with jurisdiction over the property conclusively determines the interests in the property of the parties named." [Appendix C at 45, quoting from developments in the Law — Res judicata, 65, *Harv. L. Rev.* 818, 833-934 (1952)]. But certainly no court would deny that a judgment based on in personam jurisdiction also conclusively determines the interests in the property of the parties before the Court. The circuit court is correct in its conclusion that res judicata plays a role in the case at bar, but the doctrine requires that the prior Idaho judgment be recognized as determinative on the issue of ownership of the Arizona Hotel. The Idaho divorce court's findings of fact and conclusions of law were res judicata in both the Arizona state and federal

courts. When the Ninth Circuit affirmed the Federal District Court, it contravened all existing principles of federalism and condoned the Arizona State Court's refusal to give full faith and credit to the prior Idaho judgment. The Federal Appellate Court felt obligated to follow the decision of the Arizona Supreme Court even though the state court reached its decision in derogation of the constitutional demand for full faith and credit. For federalism to exist, this Court must determine that a Federal District Court be free to choose between conflicting judgments of two states according to the mandate of full faith and credit. A Federal Court is not bound by an unconstitutional forum state judgment. Had the Arizona Supreme Court afforded full faith and credit to the Idaho decree, its judgment would be binding on the local Federal Court. Unfortunately, however, the Arizona Supreme Court disregarded this principle in reaching its decision. Consequently, it is the Idaho, not the Arizona, judgment which is entitled to res judicata effect in the Federal Court of Arizona.

2. The Ninth Circuit Court erred in holding that the Idaho Trial Court's finding of fact and conclusions of law were not entitled to full faith and credit and were not res judicata as to each and every ground jurisdictional and otherwise:

The procedure for perfecting a Full Faith and Credit Clause complaint is succinctly stated in *Leflar's, American Conflicts Law*, 180. The treatise contains the following statement:

"When two contradictory judgments are rendered

> between the same parties on the same issues, it may be assumed that the second judgment in point of time is erroneous. The first judgment rendered the matter res judicata, and as between sister states was entitled to full faith and credit. But the remedy is appeal from the second judgment, not collateral attack upon it. If appeal is not taken and the second judgment is allowed to become final, it and not the first judgment, is the one that is thereafter entitled to full faith and credit."

In *Porter v. Stanford*, 86 Ariz. 402 at 408, 347 P2d 35 at 38 (1961), the Supreme Court of Arizona interpreted the May 14, 1959 order of the Arizona separate maintenance court as a final determination that the hotel was Gladys' separate property. Petitioner did not realize that Gladys had a prior judgment determining ownership of the Arizona Hotel when he filed the divorce action in Idaho. Indeed, even Gladys felt that the property still belonged to the community. In her answer and counterclaim filed with the Idaho Court, she alleged that the hotel was community property.

The Idaho Court refused to afford final judgment status to the Arizona Court order allowing execution on the hotel property. Respondents contend that in determining that the hotel belonged to the Porter family partnership, Idaho denied full faith and credit to the Arizona court Order. If it did the Respondents should have urged this Constitutional complaint to the Supreme Court of the United States, "the final arbiter of questions arising under the Full Faith and Credit Clause," *Williams v. North Carolina*, 317 U.S. 287, 302

(1945). Since Respondents allowed the purported second judgment determining ownership of the hotel (i.e., the Idaho Court's findings of fact and conclusions of law) to become final, they were estopped from collaterally attacking the Idaho judgment in the Arizona courts.

The United States Supreme Court has passed on just such a question on several occasions. The leading case is *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, (1939). In *Treinies*, the Idaho court, with both parties before it, conferred title to certain personal property upon A, after first finding that a prior Washington judgment between the parties which awarded the property to B was not entitled to full faith and credit because of a jurisdictional defect. In a third action between A and B, B attempted to rely upon the original Washington decree. The United States Supreme Court held that B was not entitled to rely on the Washington judgment:

> ". . . because of the Idaho decision that the Washington probate court did not have exclusive jurisdiction. This is true even though the question of the Washington jurisdiction had been actually litigated and decided in favor of [B] in the Washington proceedings, the right to review that error was in those (the Idaho) proceedings . . .
>
> The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.

> One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." 308 U.S. at 76-78 (citations and footnotes omitted and emphasis added.)

Treinies is on all fours with the instant case and should control its disposition. Justice Udall acknowledged this in his Arizona dissent and the unanimous Court of Appeals in Arizona recognized that it was bound by the *Treinies* principle. *Porter v. Porter*, 1 Ariz. App. 363, 403 P.2d 298 (1965).

Subsequent Supreme Court decisions have adhered to the *Treinies* doctrine. In *Sutton v. Leib*, 342 U.S. 402 (1952), a federal court applying Illinois law in a diversity case was required to give full faith and credit to a New York Court's finding that impeached the jurisdiction of a Nevada ex parte divorce since the New York judgment was res judicata. The Court stated the New York "decree is entitled to full faith throughout the nation, in Nevada as well as in Illinois." In *Morris v. Jones*, 329 U.S. 545 (1947), the State of Illinois was required to give full faith and credit to a Missouri judgment which was subsequent to an Illinois court order staying all suits against an unincorporated insurance company. In *Roche v. McDonald*, 275 U.S. 449 (1928), a decision predating *Treinies*, the Court said:

> "If McDonald desired to rely upon the Washington statute as a protection from any judgment [in Oregon] . . . he should have set up that statute in the court of Oregon and submitted to

> that court the question of its construction and effect. And even if this had been done, he could not thereafter have impeached the validity of the judgment because of a misapprehension of the Washington law. In short, the Oregon judgment, being valid and conclusive in the court of Washington, and under the full faith and credit clause should have been enforced by them." 275 U.S. at 455.

This position is consistent with current judicial trends. Modern-day federal and state court decisions recognize that the state whose earlier judgment was denied full faith and credit by a sister-state court cannot for that reason refuse to recognize and enforce as res judicata the out-of-state decree.

For example in *Southard v. Southard*, 305 F.2d 730 (2nd Cir. 1962) (Noted in 65 W.Va. L.Rev. 220), the court held that a divorce proceeding in Connecticut which failed to give full faith and credit to a Nevada divorce, was valid. The only factor needed to be shown was that the Connecticut Court possessed jurisdiction. As the court said on page 732:

> "It is clear from the appellant's complaint that—as he admits in his brief on this appeal—he entered an appearance in the Connecticut divorce action the outcome of which he here seeks to attack. His person was thus under the jurisdiction of the Connecticut court, and there are no allegations which could support collateral attack on the judgment. Whether or not the appellant subsequently defaulted as to the further proceedings leading up to the judgment, and whether or not he was deprived of rights by errors of the Connecticut court, our determination that that

> court had jurisdiction over him and the case precludes any further attack on the judgment" Morris v. Jones, 329 U.S. 545 (1947).

In *Lewis v. Lewis*, 49 Cal.2d 389, 317 P.2d 987 (1957), the husband had obtained an ex parte divorce in Nevada but failed to set it up as a defense to an Illinois divorce action brought by the wife. Having obtained her Illinois divorce, she next sued the husband in California for accrued support payments. The husband then claimed that the Illinois decree was void for want of jurisdiction over the marriage because of the earlier Nevada decree. A unanimous California Supreme Court, per Traynor, J., stated:

> "The first answer to this contention is that it should have been invoked in the Illinois proceeding and that even if the Nevada decree had been pleaded as a defense in that proceeding and the Illinois court had erroneously failed to recognize it, defendant's remedy was by appeal and he cannot now attack the Illinois judgment." [citing *Treinies*, supra.] 49 Cal.2d at 393, 317 P.2d at 990.

The *Restatement of the Law*, Judgments, Sec. 42, describes the effect of the second judgment on a prior inconsistent judgment:

> "Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling in a third action between the parties."

Subsection (e) of Sec. 42 provides:

> "The rule stated in this Section is applicable not

> only where the actions are brought in the same State, but also where they are brought in different States."

(See Justice Udall's dissent, 101 Ariz. 131, 416 P.2d 564.)

The *Restatement of the Law* (Second), *Conflict of Laws*, (Tent. Draft No. 10, 1964), provides:

> "Sec. 439a. Inconsistent judgments. A judgment will not be recognized or enforced in other States if an inconsistent, but valid judgment is subsequently rendered in another action between the parties and if the earlier judgment is superseded by the later judgment under the local law of the State where the later judgment is rendered."

Comment (a) to the above Section states that the rule is applicable even though the court that rendered the later judgment denied full faith and credit to the first judgment or made other errors of fact or law. Comment (e) notes that the rule is one of constitutional law as between the States.

Gladys Porter appeared personally and by counsel in the Idaho proceeding and participated therein, indeed to the extent of counterclaiming for and obtaining a divorce in her favor. Not only did she not contest the jurisdiction of the court over the hotel property, she herself alleged it to be community property and prayed for a division thereof. Nor did she raise any other objection going to the jurisdiction of that court to entertain the divorce action. The only portion of the trial court's decision that she appealed to the Idaho Supreme Court was the order

enjoining her from instituting or maintaining any Arizona action against her former husband or intervenors affecting the Arizona Hotel properties. The Idaho Supreme Court ordered the trial court to amend that portion of its decree. She did not appeal the division of property or any other portion of the divorce decree.

Gladys then returned to Arizona and attacked the Idaho judgment as being invalid and not entitled to full faith and credit. In an opinion devoid of any mention of developed principles of res judicata and full faith and credit, a majority of that Court upheld her attack. Those constitutional principles, discussed immediately below, necessarily require the lower federal court to levy execution on the Idaho judgment.

Although the Full Faith and Credit Clause of the Constitution does not prevent one State's courts from allowing a party to collaterally attack an ex-parte sister-State judgment for lack of jurisdiction, *Williams v. North Carolina*, 325 U.S. 226, 65 S. Ct. 1092, 89 L.Ed. 1577 (1945), the rule is quite different when such an attack is made upon the other judgment when the complaining party appeared therein and participated in procuring the judgment. In the latter instance, as in the case at bar, the first judgment is entitled to full faith and credit, is res judicata as to all issues, including those of jurisdiction, and cannot be attacked collaterally where such an attack would not be allowed in the State of rendition. *Johnson v. Muelberger*, 340 U.S. 581, 587, 71 S.Ct. 474, 95 L.Ed. 552 (1951). In *Sherrer v. Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948), which held that a

foreign divorce decree could not, under these circumstances, be attacked for want of jurisdiction over the subject matter, the Supreme Court elaborated at length upon the controlling principles:

> "The requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister-State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attacks in the courts of the state which rendered the decree . . .
>
> "If respondent failed to take advantage of the opportunities afforded him the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister-State on a decree valid in the state in which it was rendered." 334 U.S. at 351-52.

The subsequent case of *Coe v. Coe*, 334 U.S. 378, 68 S.Ct. 1004, 92 L.Ed. 1451 (1948), applied the *Sherrer* rule where the defendant spouse appeared but failed to raise any objection to the jurisdiction of the court over the subject matter.

In order for the prior foreign decree to constitute res judicata, nothing more is required than that an opportunity be provided the defendant to contest the Court's jurisdiction. It matters not that he chooses not to do so or neglects to do so. *Cf. Chicot County Drainage District v. Baxter*, 308 U.S. 371, 60 S.Ct.

31 , 84 L.Ed. 329 (1940). The foreign judgment is conclusive as to all issues that were or could have been litigated.

The Ninth Circuit articulated the rule that a foreign State's judgment may be collaterally attacked only if such judgment is subject to collateral attack in said foreign state in *Durlacher v. Durlacher*, 123 F.2d 70 (9th Cir. 1941). Mrs. Helen Durlacher obtained a separate maintenance decree in New York. Subsequently, Mr. Simon Durlacher obtained a divorce in Nevada. This action in turn was followed by a suit in New York by Mrs. Durlacher for support payments accrued since the Nevada divorce. Simon failed, in the New York Court, to raise the question of New York's jurisdiction after the Nevada divorce. Under New York law, the failure to raise the jurisdictional issue at the trial, precluded collateral attack. Thus, when Mrs. Durlacher returned to the Nevada Federal Court, Mr. Durlacher was precluded from collaterally attacking the New York judgment. As the Ninth Circuit stated at page 71-72:

> "Nevertheless in New York Simon [Durlacher] could have brought a suit in which he would have been entitled to show that the court had lost jurisdiction in the maintenance proceeding. If successful he could have restrained Helen from procuring execution or suing on her New York judgment in the maintenance proceeding. However, he could not have prevailed in such a separate suit because the divorce decree he would have pleaded as causing the loss of jurisdiction in the maintenance proceeding was obtained without Helen's appearance therein or her presence in Nevada or her service within that state.

> New York holds invalid a divorce decree so obtained. Hence, in New York, Helen's maintenance judgment was secure from collateral attack and would be given full faith and credit in that jurisdiction."

The Ninth Circuit articulated this same position in *Basset v. Bassett*, 141 F.2d 954 (9th Cir. 1944), a case very similar to the one before this Court. Mrs. Bassett secured a separate maintenance order from the State of New York against her husband. Later Mr. Bassett received an absolute divorce in the State of Nevada. The Nevada decree purported to release the husband from any further support payments under the New York judgment. Later Mrs. Bassett sued and received a judgment in New York for support payments accrued since the divorce. As in this case, Mr. Bassett chose not to raise the first state's decree in the second state. Mrs. Bassett sued in the Nevada Federal District Court for execution on the New York judgments. That Court dismissed the action on the ground that the Nevada decree was res judicata. The Ninth Circuit reversed on the ground that since the New York Court possessed jurisdiction of the parties, the only place Mr. Bassett could attack the New York decree was in New York, as the Court stated at page 955:

> ". . . The State of New York had acquired jurisdiction over both parties to this appeal in the original separate maintenance action and, according to its law, retained jurisdiction throughout the proceedings leading to the two judgments questioned here. In those proceedings William Bassett could have appeared and pleaded

any defense that he may have had, but this he failed to do. Had he appeared in the New York proceeding ssubsequent to the granting of the original decree and been unsuccessful, his recourse would have been in the Appellate Courts of New York and the Supreme Court of the United States.

"As here presented we are asked to accept the decree of a Nevada State Court which, in effect, attempts to set aside decrees or judgments of a Court of New York . . ."

As in *Bassett* and *Durlacher*, Gladys Porter was subject to the jurisdiction of an out of state court, in this case Idaho, and failed to raise the jurisdictional question. As in *Bassett* and *Durlacher* she later raised that question in the first State, in our case Arizona. The *Bassett* and *Durlacher* cases, conclusively establish that the original state must honor the second State's decree, regardless of what defenses could have been raised in the other state assuming, as here, that the decision is not subject to collateral attack in the first State.

One of the primary arguments of the majority opinion in the Arizona collateral attack is that the Idaho court did not have jurisdiction to directly effect Gladys' separate property in Arizona. There are two answers to this contention. First, since Gladys herself executed the deeds to the Arizona property, the Idaho court did not "directly affect" title to Arizona realty. [*Kennedy v. Morrow*, 77 Ariz. 152, 268 P.2d 326 (1954).] The Arizona Supreme Court attempted to answer this point in the majority opinion. *Porter*

v. Porter, supra, 416 P.2d at 569-570. The state court said that "here, the Appellants action in Idaho was in the nature of a suit to quiet title to the Arizona Hotel and the Court undertook to directly adjudicate title thereto." See *Fall v. Eastin,* 215 U.S. 1, 8, 11-12 (1909). It is impossible to classify Arnold's divorce action as a direct adjudication of title to the Arizona Hotel. All of the community property, and all of the parties claiming an interest in the property were before the Idaho divorce court. The Idaho court merely determined the rights of the parties before it. Arizona had precedent to grant full faith and credit to foreign equity decrees which indirectly adjudicated title to local land. *Kennedy v. Morrow, supra,* held that when an equity court has jurisdiction of the parties, it may adjudicate their interests in realty lying outside territorial jurisdiction. In *Kennedy,* a California court compelled the husband in a divorce action to quitclaim title to Arizona property to his wife. In upholding this case the Supreme Court of Arizona said that "it is immaterial that the decree of the (foreign) court could not of its own force transfer an interest in the realty, for equity may use its contempt process on the person, and compel the parties to execute deeds, releases, quitclaims, etc., which are effective of their own force." The Arizona Supreme Court's futile attempt to distinguish this case reveals the court's desire to ignore full faith and credit principles. The court asserted that the Idaho court "did not merely determine the rights of the parties before it . . . [because] the partnership in which ownership of the hotel was found to be lodged was not a party before the court . . . The Uniform Partnership Act is in effect in Idaho so

that a partnership can sue or be sued in its own name." (*Porter v. Porter*, *supra*, 416 P2d at 569). All of the partners were before the Idaho court, and, therefore, its judgment was binding on the partnership. Such grasping at straws reveals the Arizona court's determination to deny full faith and credit to the Idaho court's adjudication of title to the Arizona Hotel.

The second answer to the Arizona court's position that the Idaho court had no jurisdiction to directly adjudicate title to Arizona land is that the Idaho court determined for itself from the parties' pleading that it had jurisdiction to order Gladys to convey her interest in the property. It is now settled that the adjudication of facts affecting title to land located in another state becomes res judicata in the state of the situs.

The United States Supreme Court has discussed the effect of an in personam judgment concerning real property in a case concerning land lying between Nebraska and Missouri. The Nebraska court litigated the matter and the losing party went to Missouri claiming the land was located in the State of Missouri. The United States Supreme Court in *Durfee v. Duke*, 175 U.S. 106, (1963), stated.

> "With respect to questions of jurisdiction over the person, this principle was unambiguously established in Baldwin v. Iowa State Traveling Men's Assn. 283, 522. There it was held that a federal court in Iowa must give binding effect to the judgment of a federal court in Missouri despite the claim that the original court did not have jurisdiction over the defendant's person, once it was shown to the court in Iowa that that question had been fully litigated in the Missouri

forum. 'Public policy,' said the Court, 'dictates that here be an end of litigation; that those who have contested an issue shall be bound by the results of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.'" 283 U.S., at 525-526.

"Following the Baldwin case, this Court soon made clear in a series of decisions that the general rule is no different when the claim is made that the original forum did not have jurisdiction over the subject matter. Davis v. Davis, 305 U.S. 32; Stoll v. Gottleib, 305 U.S. 165; Treinies v. Sunshine Mining Co., 308 U.S. 66; Sherrer v. Sherrer, 334 U.S. 343. In each of these cases the claim was made that a court, when asked to enforce the judgment of another forum, was free to re-try the question of that forum's jurisdiction over the subject matter. In each case this Court held that since the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in the subsequent action between the parties." [Footnotes omitted]

The Court concluded by saying this rule of jurisdictional finality should apply to a case involving real property as between the parties to the litigation.

Relying upon recent constitutional precedent, the American Law Institute has addressed itself anew to this very problem. In *Restatement of the Law* (Sec-

ond), *Conflict of Laws* (Tent. Draft No. 10) (1964), Sec. 430d, it is stated:

> "When a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the local law of the State where the judgment was rendered determines, subject to constitutional limitations, whether the parties are precluded from collaterally attacking the judgment on the ground that the court had no jurisdiction over the subject matter."

In Comment (c) to the above Section, the Institute concluded that:

> "Due process does not prevent a State from impinging on the interests of a sister-State by application of rule that parties who were subject to the jurisdiction of the court cannot collaterally attack the judgment for lack of jurisdiction over the subject matter."

Having participated fully in the Idaho proceedings, but having failed to claim jurisdictional error there, one must look to Idaho law in order to ascertain whether Gladys is entitled to collaterally attack its decree on the grounds invoked by the majority opinion. In *Treece v. Treece*, 84 Idaho 457, 373 P.2d 750 (1962), that court stated that a divorce decree regular upon its face could not be attacked collaterally by a party except on the ground of extrinsic fraud. Said judgments are held to be conclusive as between the parties on all issues determined or which should have been determined thereby. See also *Robinson v. Robinson*, 70 Idaho 122, 212 P.2d 1031 (1949). Having pleaded that the hotel property was community prop-

erty, thereby giving that Court jurisdiction to divide it, the judgment is regular upon its face. Neither Gladys nor the majority opinion in Arizona suggest that the proceedings there were had as a result of fraud. Thus, since Gladys could not collaterally attack the decree in Idaho, she cannot do so in Arizona.

Therefore, the Idaho divorce decree is res judicata on the questions of whether the hotel property is or was community property or her separate property and as to the validity of the trial court's order compelling her to convey her interests therein to the partners. Even if the Idaho court erred in refusing to enforce the accrued installments, and even if Gladys had indeed placed the facts of the Arizona sheriff's sale before that court and the latter had erroneously refused to give such "proceedings" effect, the Idaho decree is nonetheless entitled to full faith and credit. Retaliation by the courts of Arizona is fundamentally inconsistent with notions of full faith and credit.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and judgment should be rendered for Petitioners.

Respectfully submitted,

STERLING W. STEVES
ROBERT R. BODOIN
524 Fort Worth Club Bldg.
Fort Worth, Texas 76102

By: Sterl. W. Steves
Sterling W. Steves
Attorneys for Petitioners

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing Petition for a writ of certiorari to the United States Court of Appeals for the ninth circuit was this 16 day of February, 1970, deposited in the United States Mail, air mail, postage prepaid to Messrs. Lutich, D'Angelo and Wilson, Attorneys at Law, 3120 N. Third Avenue, Phoenix, Arizona, 85013, attorneys for the respondent.

Of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 3583-Phx.

PEARLINE PORTER, et al, Plaintiffs
vs.
W. FRANCIS WILSON, et al, Defendants

ORDER FOR DISMISSAL

This matter came on regularly for hearing by the Court on Motions of the parties, PAUL BEER appearing on behalf of Plaintiffs, and RICHARD A. WILSON appearing on behalf of Defendants, and the Court, having heard argument of counsel and being fully advised in the law and the premises, finds that there is no issue in this matter for the Court to try;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-entitled matter be, and the same is hereby, dismissed, with prejudice.

DONE IN OPEN COURT this 14th day of June, 1967.

/s/ C. A. MUECKE
Judge

FILED JUNE 14, 1967
WM. H. LOVELESS, Clerk
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY/s/WINMA ANDRE
Deputy Clerk

UNITED STATES DISTRICT COURT
For The
DISTRICT OF ARIZONA

Civil Action File No. Civ-3583 Phoenix

PEARLINE PORTER, et al, Plaintiffs
vs.
W. FRANCIS WILSON, et al, Defendants

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable C. A. MUECKE, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered, granting defendants' Motion to Dismiss with prejudice,

It is Ordered and Adjudged that the plaintiffs take nothing and that the action be dismissed.

Dated at Phoenix, Arizona, this 14th day of June, 1967.

WM. H. LOVELESS
Clerk of Court

FILED JUNE 14, 1967
WM. H. LOVELESS, Clerk
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY/s/WINMA ANDRE
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DATE Sept. 8, 1967

No. CIVIL 3583 Phx.

PEARLINE PORTER, et al, Plaintiffs

vs.

W. FRANCIS WILSON, et al, Defendants

ORDER

IT IS HEREBY ORDERED that plaintiff William A. Porter's Motion for a New Trial having been argued and submitted and the Court having duly considered the same, is DENIED for the reason that this Court is obligated under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) to follow the conflict of laws rules promulgated by the Supreme Court of this State. *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 198 (1941).

/s/ C. A. MUECKE
United States District Judge

FILED SEP. 8, 1967
WM. H. LOVELESS, Clerk
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY/s/WINMA ANDRE
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,516

WILLIAM A. PORTER, et al.,
Plaintiffs-Appellants,
vs.
W. FRANCIS WILSON, et al.,
Defendants-Appellees.

November 19, 1969

Appeal from the United States District Court
for the District of Arizona

Before: BROWNING, ELY, and CARTER, Circuit Judges BROWNING, Circuit Judge:

This appeal presents a troublesome problem concerning full faith and credit (Art. IV, § 1; 28 U.S.C. § 1738), and the doctrine of *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938).

Plaintiff-appellants William A. Porter and his two sisters, Pearline Porter and Pauline Leonard, doing business as Continental Hotels System, a co-partnership, filed this diversity action in the United States District Court for the District of Arizona to quiet title to the Arizona Hotel, located in Phoenix, Arizona, against an adverse claim asserted by defendant-appellees W. Francis Wilson, Richard A. Wilson, and their wives.

The Wilsons answered, asserting that Mr. Porter's former wife, Gladys E. Porter, had acquired Mr.

Porter's interest in the property by deed of the Sheriff of Maricopa County, Arizona, issued pursuant to a sheriff's sale on execution to satisfy a judgment; and that Mrs. Porter had quitclaimed one half of her interest in the property to the defendants on May 4, 1960.

Plaintiffs and defendants filed cross-motions for summary judgment. Plaintiffs contended that their right to title was conclusively determined by a judgment finalized by the Supreme Court of Idaho in *Porter v. Porter*, 84 Idaho 400, 373 P.2d 327 (1962). Defendants argued that the title dispute was settled adversely to plaintiffs by the Supreme Court of Arizona in *Porter v. Porter*, 101 Ariz. 131, 416 P.2d 564 (1966), certiorari denied 386 U.S. 957. The district court held that under the *Erie* doctrine the opinion in the latter action was res judicata, and dismissed the plaintiffs' suit. This appeal followed.

The chronology of the prior litigation is as follows.[1]

On February 13, 1959, Mrs. Porter filed a separate maintenance action against Mr. Porter in the Superior Court of Maricopa County, Arizona, and attached the Arizona Hotel. Service was obtained upon Mr. Porter by publication and registered mail in accordance with Arizona law (16 A.R.S., Arizona Rules of Civil Pro-

[1]The facts are not in dispute. This summary of the prior litigation is drawn from an affidavit attached to plaintiffs' motion for summary judgment and the following published opinions of the Idaho and Arizona courts. Kemble v. Stanford, 86 Ariz. 392, 347 P.2d (1959); Porter v. Stanford, 86 Ariz. 402, 347 P.2d 35 (1959); Kemble v. Porter, 88 Ariz. 417, 357 P.2d 155 (1960); Porter v. Porter, 84 Idaho 400, 373 P.2d 327 (1962); Porter v. Porter, 101 Ariz.App. 363, 403 P.2d 298 (1965); Porter v. Porter, 101 Ariz. 131, 416 P.2d 564 (1966).

cedure, Rule 4(e)). The complaint alleged that Mrs. Porter was a resident of Arizona, that her husband was a resident of Idaho, and that the Arizona Hotel was community property. It asked, among other things, that a portion of the income of the hotel be set aside for the support of Mrs. Porter and minor children of the marriage.

Mr. Porter did not appear. The Porter sisters intervened in the proceedings, however, alleging that although record title to the Arizona Hotel was in Mr. and Mrs. Porter, the hotel was owned by the Continental Hotels System, a partnership composed of Mr. and Mrs. Porter, who owned a two-thirds interest, and the Porter sisters, who owned a one-third interest.

The Arizona court appointed a receiver to manage and conserve the hotel.

On May 14, 1959, the Arizona court entered a decree of separate maintenance in favor of Mrs. Porter, determined that the Arizona Hotel was community property rather than the property of the partnership,[2] and imposed a lien on the hotel for support payments, attorneys' fees, and costs. On June 1, 1959, the court ordered the receiver to pay $1,000 a month toward the support of Mrs. Porter and the children, pendente lite.

[2]*See* Porter v. Stanford, *supra*, 86 Ariz. at 408, 347 P.2d at 38, interpreting this decree as including a finding that the hotel was community property rather than property of the partnership, which finding was res judicata so far as Mr. Porter was concerned. The court further held that, as the record then stood, this finding was also binding upon the Porter sisters because of the presumption arising from an uncontroverted allegation that the record title was in Mr. and Mrs. Porter.

On July 21, 1959, the Arizona trial court entered a judgment[3] for the arrearage in support payments due Mrs. Porter under the earlier judgments. Mrs. Porter obtained execution and levied upon the hotel, and on August 20, 1959, purchased all of Mr. Porter's interest at the sheriff's sale. On April 7, 1960, Mrs. Porter received a sheriff's deed to the property.[4]

Meanwhile, on May 25, 1959, eleven days after the Arizona court issued its separate maintenance decree, Mr. Porter sued Mrs. Porter for divorce in the Idaho District Court in Kootenai County, their marital domicile. Mrs. Porter appeared in the Idaho court, filing an answer and counterclaim. She prayed for a divorce, custody of the children, support payments, and one half of the community property. She asked also that the Arizona separate maintenance decree be given full faith and credit and that judgment be entered in accordance with its terms, including a money judgment for payments past due.

The Porter sisters intervened in the Idaho action and asserted their partnership interest in the Phoenix hotel. Thus all parties appeared personally in the Idaho proceedings.[5]

On December 28, 1960, the Idaho district court, after trial, entered its final judgment. The Idaho court

[3]This judgment, under Arizona law, was a final judgment. Porter v. Porter, *supra*, 101 Ariz. at 131, 416 P.2d at 566.

[4]In Porter v. Porter, *id.* at 131, 416 P.2d at 566, the Arizona Supreme Court concluded that as a result of the sheriff's sale and deed, Mrs. Porter became sole owner of whatever interest Mr. Porter had in the hotel.

[5]Defendant-appellees W. Francis Wilson and Richard A. Wilson were Mrs. Porter's attorneys in both the Arizona and Idaho litigation, and thus were fully aware of the adverse claims to the hotel property.

granted Mrs. Porter a divorce, but held that the Arizona separate maintenance decree was not entitled to full faith and credit because Mr. Porter had not been served in Arizona and had not appeared personally in the Arizona action. The Idaho court therefore made its own award with regard to custody of the children, child support, and alimony. It also re-examined the question of the ownership of the Arizona Hotel, and determined that the hotel was partnership property rather than the sole property of Mr. and Mrs. Porter. In dividing the community property, the Idaho court awarded Mr. and Mrs. Porter's two-thirds partnership interest in the Arizona Hotel to Mr. Porter. Accordingly, Mrs. Porter was ordered to transfer her interest in the hotel to Mr. Porter. She was also required to dismiss the proceedings in Arizona, remove the Arizona receivership, release the judgments she had theretofore obtained, and refrain from maintaining any action in the future against Mr. Porter or the Porter sisters affecting the hotel.

On July 12, 1962, the judgment of the Idaho district court was modified in a respect not relevant here and otherwise affirmed by the Supreme Court of Idaho. *Porter v. Porter, supra*, 84 Idaho 400, 373 P.2d 327. Mrs. Porter executed the deeds required of her by the Idaho decree. This is the prior adjudication upon which plaintiffs rely.

The Porter sisters filed a supplemental complaint in intervention in the Arizona separate maintenance action seeking full faith and credit for the Idaho court's determination that the Arizona Hotel was partnership property, and alleging that Mrs. Porter had relin-

quished her interest in the hotel in compliance with the terms of the Idaho decree. The Arizona trial court directed entry of judgment on the complaint in intervention in favor of Mrs. Porter.

The Arizona Court of Appeals reversed, holding that since the Idaho court had personal jurisdiction over the parties the Arizona courts were required to give full faith and credit to the Idaho judgment adjudicating the in personam rights of the parties in the Arizona Hotel. *Porter v. Porter*, 1 Ariz.App. 363, 403 P.2d 298 (1965).

On July 14, 1966, however, the Arizona Supreme Court reversed the Arizona Court of Appeals. The Arizona Supreme Court held that the Idaho judgment was not entitled to full faith and credit, and that there was no other showing before the Arizona trial court sufficient to overcome the presumption from the record title that the hotel was community rather than partnership property when acquired by Mrs. Porter at the sheriff's sale. The Supreme Court therefore vacated the Court of Appeals opinion and affirmed the judgment of the Arizona trial court. *Porter v. Porter*, 101 Ariz. 131, 416 P.2d 564 (1966). The Supreme Court of the United States denied certiorari. 386 U.S. 957 (1967). This is the prior adjudication upon which defendants rely.

We have concluded that the federal district court properly held that it was bound by the Arizona Supreme Court's decision.

This is not because the Arizona Supreme Court's ruling was correct, but rather because the full faith

and credit requirement and the *Erie* doctrine compel acceptance of the Arizona judgment even if the Arizona court erred in refusing to give full faith and credit in the prior Idaho judgment.[6]

The issue presented to the federal district court for Arizona was whether the Idaho adjudication of the conflicting claims of Mrs. Porter and the Continental Hotels Systems partnership to ownership of the Arizona Hotel was entitled to full faith and credit in Arizona. But the Porter sisters had already presented this precise issue to the Arizona courts in their supplemental complaint in intervention in the Arizona separate maintenance proceeding, and the Arizona Supreme Court had decided that issue against them. The Porter sisters were bound by this decision in subsequent litigation in the federal district court.

The Arizona Supreme Court's decision also bound Mr. Porter, the original named defendant in the separate maintenance suit, though he did not appear personally in the litigation. The Arizona courts had jurisdiction to render a judgment in the separate maintenance proceeding with respect to Mr. Porter's interest in the hotel which would bind Mr. Porter; the property was located in Arizona; it was brought within the jurisdiction of the Arizona court by attach-

[6]The Arizona Supreme Court's decision is criticized in 9 Ariz. L. Rev. 88 (1967) and 71 Dick. L. Rev. 487 (1967), and is cited in several commentaries as contrary to the Supreme Court's holding in Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939). Restatement (Second) of Conflicts § 114, at 410; Leflar, American Conflicts Law 180 n.9 (1968 ed.). A similar decision of the Nevada Supreme Court, Colby v. Colby, 78 Nev. 150, 369 P.2d 1019 (1962), has also been subjected to critical comment. *See* 63 Colum. L. Rev. 560 (1963); 31 Geo. Wash. L. Rev. 648 (1963); 15 Stan. L. Rev. 331 (1963); 16 Vand. L. Rev. 193 (1963).

ment; and reasonable notice and opportunity to appear were afforded Mr. Porter through service by publication and mail in accordance with the Arizona statute.[7] "A quasi-in-rem judgment by a court with jurisdiction over the property conclusively determines the interests in the property of the parties named" (Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 833-34 (1952), and is entitled to full faith and credit to the extent of the named defendants' interest in the property. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 n.6 (1957); *Huron Holding Co. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 194 (1941); *Pennington v. Fourth National Bank*, 243 U.S. 269, 271-72 (1917); *Pennoyer v. Neff*, 95 U.S. 714, 727, 730, 731 (1877).

Defendants' basic error, it seems to us, lies in the mistaken assumption that it was the role of the fed-

[7]Moreover, it is clear from the record that Mr. Porter had ample opportunity to litigate the full faith and credit issue in the Arizona court.

Mr. Porter was aware that his sisters had submitted the full faith and credit issue to the Arizona court in their supplemental complaint in intervention. On September 10, 1964, he joined the other plaintiffs in an application to the court below to stay further proceedings pending the Arizona Supreme Court's resolution of this issue. The application represented "that the bulk of the issues [in the federal action] are expected to be determined in" the appeal in Arizona state proceeding and that "the immediate prosecution of the [federal] action would be a waste of time and effort on the part of the court, litigants and counsel." The federal court granted the stay.

Subsequently, after the Arizona Court of Appeals had rendered a decision favorable to Mr. Porter's sisters, and while an appeal from that decision was pending before the Supreme Court of Arizona, Mr. Porter joined his sisters in the motion asking the federal district court to grant summary judgment in their favor.

The attorneys who filed the application for a stay and the motion for summary judgment also represented the Porter sisters in the Arizona state litigation.

eral district court to review and revise the decision of the Supreme Court of Arizona on the issue presented to that court under the full faith and credit clause. The sole function of the federal court, however, was to give the Arizona judgment "the same full faith and credit . . . as [it] ha[d] by law or usage in the [Arizona] courts . . ." 28 U.S.C. § 1738 (1964). Plaintiffs' remedy for an erroneous denial of full faith and credit to the Idaho judgment by the Arizona Supreme Court was reviewed in the Supreme Court of the United States, not collateral attack in the federal district court. This is the holding of *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 74-78 (1939). *See also Morris v. Jones*, 329 U.S. 545, 552 (1947); *Southard v. Southard*, 305 F.2d 730, 732 (2d Cir. 1962).

This would be true even if contradictory judgments were involved, for "[i]t is the latest final adjudication of the issue which controls, even though the latest is one which could itself have been reversed for violation of the full faith and credit clause had timely appeal been taken." Leflar, American Conflicts Law 187 (1968 ed.); *see also* Restatement (Second) of Conflicts § 114, comment a & b, 407-09 (1967); Restatement of Judgments § 42 (1942); 15 Stan. L. Rev. 331, 335-36 (1963). Here the case is clearer, for the Arizona judgment was the first and only adjudication of the issue of whether the Idaho judgment was entitled to full faith and credit. Right or wrong, it should be the last. 9 Ariz. L. Rev. 88, 89-90. *See Roche v. McDonald*, 275 U.S. 449, 454-55 (1928).

This disposition is faithful to the full faith and credit clause's purpose to integrate and unify the na-

tion by according finality to the prior final adjudication of an issue by another state or federal court. *Sutton v. Leib*, 342 U.S. 402, 407-09 (1952); *Riley v. New York, Trust Co.*, 315 U.S. 343, 348-49 (1942); This is so whether or not the Idaho court erred in refusing to give full faith and credit to the Arizona judgment, and whether or not the Arizona court in turn erred in refusing to give full faith and credit to the Idaho judgment. The federal district court had no power to undo the prior decisions of the Idaho and Arizona courts; it could end the chain of relitigation only by stopping it where it then stood.

Erie leads also to the conclusion that the Arizona Supreme Court judgment must be followed. This is obviously so if the Arizona law to be applied by the federal court is that reflected in the decision of the Arizona Supreme Court. And even recognizing that the federal district court for Arizona is subject to an overriding duty to adhere to federal constitutional and statutory provisions, including those pertaining to full faith and credit,[8] the latter, as we have pointed out, required recognition of the Arizona adjudication, whether or not it was correct.

The Supreme Court recently restated the purpose of *Erie:* "The *Erie* rule is rooted in part in a realization

[8]Wells v. Simonds Abrasive Co., 345 U.S. 514, 516 (1953); First Nat. Bank v. United Air Lines, 342 U.S. 396, 399, 400-01 (1952) (concurring opinion of Justice Jackson); Holm v. Shilinsky, 388 F.2d 54, 56 n.2 (2d Cir. 1968); 1A J. Moore, Federal Practice ¶ 0.311(2), 3412-14 (1968); Goodrich, Conflict of Laws §§ 21-25 (4th ed. 1964); Cheatham, Federal Control of Conflict of Laws, 6 Vand. L. Rev. 581, 600 (1953); Leflar, Constitutional Limits on Free Choice of Law, 28 Law & Contemp. Prob. 705 (1963); Wolkin, Conflict of Laws in the Federal Courts: Thirteen Years of Erie R.R. Co. v. Tompkins, 3 Syracuse L. Rev. 47, 51 (1952).

that it would be unfair for the character or result of a litigation materially to differ because the suit has been brought in a federal court . . . The decision was also in part a reaction to the practice of 'forum-shopping' . . . " *Hanna v. Plumer*, 380 U.S. 460, 467 (1963). *See also Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945): *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 180 (1940). Clearly, both *Erie* aims are served by the federal district court's acceptance of the Arizona Supreme Court's decision.

Affirmed.